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Lai Chu Sing v Lai Teck Sian & Ors

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HIGH COURT (MELAKA) — CIVIL SUIT NO 22NCVC-32–5 OF 2014
MOHD FIRUZ JC
25 MAY 2016

C

Companies and Corporations — Directors — Liability — Whether plaintiff and first defendant obtained financial assistance from company for purposes of acquiring shares in the company — Whether plaintiff had locus standi to initiate action for breach of Companies Act 1965

D

Contract — Sale of shares — Agreement between plaintiff and first defendant to sell plaintiff's shares in company — Contravention of law — First defendant obtained financial assistance from company for purposes of acquiring shares in the company — Whether parties contravened s 67(1) of the Companies Act 1965 — Whether share sale transaction illegal — Whether transaction null and void — Whether share sale transaction separate and distinct from loan transaction

E

Evidence — Standard of proof — Whether plaintiff succeeded in proving his claim on a balance of probabilities — Non est factum — Whether plaintiff's plea of non est factum would affect validity of documents he signed

F

The plaintiff and the first defendant were both brothers and shareholders in the third defendant company ('the company'). The plaintiff and defendant each owned 500,000 shares in the company in which the plaintiff was the chairman and director whilst the first defendant was the managing director. The second defendant was the wife of the first defendant. Sometime after the company successfully sold off three of its properties for a net sum of approximately RM6m, the first defendant proposed the implementation of a succession plan. The succession plan involved one party exiting the company and the other party assuming full control of the company by way of sale or transfer of the shares of the exiting shareholder. Thus, it was the first defendant's proposal that either the plaintiff or he exit the company, with the exiting party to be paid a sum of RM7.5m for their 500,000 shares. The plaintiff neither accepted nor rejected the proposal but conducted an inspection of the company's stock and machineries in the company's premises. Subsequently, after receiving a counter-offer the plaintiff had agreed to sell his shares in the company for RM8m. Both the plaintiff and the first defendant then signed a resolution allowing the first defendant to borrow RM8m from the company. The first defendant had then advanced the RM8m loan, which he borrowed from the

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company, to the second defendant, to enable her to purchase the plaintiff's shares. The plaintiff received the RM8m for his shares in the company and the first and second defendants became shareholders and directors of the company. Thereafter, the company declared a dividend amounting to RM8.5m. The dividends were apportioned equally between the first and second defendants and subsequently used to set off the loan of RM8m taken by the first defendant from the company. On 10 April 2014, the plaintiff demanded for the return of his 500,000 shares and his re-instatement as a director of the company. The plaintiff alleged that the RM8m that was paid to him was only an initial payment and that the final figure for the 500,000 shares was subject to audited accounts of the company's assets and liabilities as of 31 March 2012. The plaintiff then filed a civil suit claiming that he had not agreed to sell his shares in the company for RM8m and that the first defendant had devised a scheme to defraud him. It was also the plaintiff's case that the sale and purchase and transfer of his 500,000 shares in the company which was paid by the loan given by the company was contrary to the provisions of the Companies Act 1965 ('the Act') and therefore illegal. As such, the plaintiff submitted that the share sale transaction was null and void and therefore sought restitution of his 500,000 shares to him. The first and second defendants denied the plaintiff's allegations and maintained that the plaintiff had sold his 500,000 shares in the company to the second defendant for a consideration of RM8m and that the present suit was an attempt to force the defendants to pay more for the shares. The second defendant also counterclaimed for the return of the RM8m received by the plaintiff, in the event the share sale transaction was found to be null and void.

Held, dismissing the plaintiff's claim with costs of RM30,000 and the counterclaim with no order as to costs:

(1) Although the plaintiff claimed he could not read or write, what more understand English, it was clear that he was not an ignorant a person. It was also evident from the way he dealt with the offer from the first defendant ie conducting an independent inspection on the stocks and machineries instead of giving an answer to the first defendant's proposal that he understood the order of business as well as what was going on in the company. In any event, the plaintiff's plea of *non est factum* did not affect the validity of the documents that he signed, namely the share sale documents (see para 29).

(2) The contemporaneous documents on the transfer of the shares, also clearly operated against the plaintiff. Based on the notices of demand issued by the plaintiff, the fact that the plaintiff sought a discharge as guarantor for some of the loans taken by the company seemed to suggest that the issue of the plaintiff seeking for a revaluation was an afterthought. In the circumstances, the plaintiff had not succeeded in proving his claim on a balance of probabilities (see paras 27 & 29).

(3) The fact that the first defendant obtained financial assistance from the company for purposes of acquiring shares in the company, clearly contravened s 67(1) of the Act. However, the share sale transaction in the present case was valid and enforceable despite there being a contravention of s 67 of the Act by both the plaintiff and the first defendant. This was because the share sale transaction was separate and distinct from the loan transaction of RM8m to the first defendant. It was the loan transaction, which was prohibited by s 67(1) of the Act and not the acquisition of the shares in the company. The fact that the plaintiff and the first defendant were the only shareholders in the company and that the share sale transaction was entered into for the future of the company were also factors that were taken into consideration in arriving at this conclusion (see paras 49–52).

(4) As for the loan of RM8m to the first defendant, it was up to the company as to what it decided to do. In any case, the plaintiff who was no longer a director or shareholder of the company and had no locus standi to initiate any action on it. Further, the plaintiff had duly submitted that since the company had declared a dividend of RM8m, there was no loss to the company arising from the transaction (see para 53).

(5) In the event the share sale transaction was valid and enforceable, the plaintiff's cause of action in asking this court to declare the share sale transaction void, was akin to asking this court to enforce a transaction, founded on an illegal act due to the fact that the 500,000 shares purchased from the plaintiff was paid via monies obtained from an illegal loan transaction. It is trite law that a cause of action, which was founded on an illegal act, could not succeed (see paras 54–56).

[Bahasa Malaysia summary

Plaintif dan defendan pertama adalah adik-beradik dan pemegang saham dalam defendan ketiga ('syarikat'). Plaintif dan defendan masing-masing memegang 500,000 saham dalam syarikat yang mana plaintif adalah pengerusi dan pengarah manakala defendan pertama adalah pengarah urusan. Defendan kedua adalah isteri defendan pertama. Selepas syarikat berjaya menjual tiga daripada hartanah bagi jumlah kira-kira RM6 juta, defendan pertama mencadangkan implementasi pelan pewarisan. Pelan pewarisan melibatkan satu pihak keluar dari syarikat dan satu pihak lagi mengambil kawalan penuh syarikat melalui jualan atau pindah milik saham pemegang saham yang keluar. Oleh itu, cadangan defendan pertama adalah sama ada dia atau plaintif keluar daripada syarikat, dengan pihak yang keluar dibayar RM7.5 juta atau saham 500,000. Plaintif tidak menerima mahupun menolak cadangan tersebut tetapi menjalankan pemeriksaan pada stok syarikat dan mesin di premis syarikat. Seterusnya, selepas menerima tawaran balas, plaintif bersetuju menjual sahamnya dalam syarikat sebanyak RM8 juta. Kedua-dua plaintif dan defendan pertama seterusnya menandatangani resolusi membenarkan

defendan pertama meminjam RM8 juta daripada syarikat. Defendan pertama memberi pinjaman RM8 juta, yang dipinjam olehnya daripada syarikat, kepada defendan kedua, untuk membolehkannya membeli saham-saham plaintif. Plaintif menerima RM8 juta bagi saham-saham dalam syarikat dan defendan pertama dan kedua menjadi pemegang saham dan pengarah-pengarah syarikat. Selepas itu, syarikat mengisytiharkan dividen berjumlah RM8.5 juta. Dividen ini dibahagikan sama rata antara defendan pertama dan kedua dan seterusnya digunakan menolak selesai pinjaman RM8 juta yang diambil oleh defendan pertama daripada syarikat. Pada 10 April 2014, plaintif menuntut pemulangan 500,000 saham dan pengembaliannya kepada jawatan pengarah syarikat. Plaintif mendakwa bahawa RM8 juta yang dibayar kepadanya adalah bayaran asal dan bahawa jumlah akhir bagi saham 500,000 tertakluk pada akaun aset dan liabiliti syarikat yang diaudit pada 31 Mac 2012. Plaintif kemudian memfailkan guaman sivil, mendakwa bahawa dia tidak bersetuju menjual sahamnya dalam syarikat bagi RM8 juta dan bahawa defendan pertama telah membuat skim untuk menipunya. Menurut plaintif, jual beli dan pindah milik 500,000 saham dalam syarikat yang dibayar oleh pinjaman yang diberi oleh syarikat bertentangan dengan peruntukan Akta Syarikat 1965 ('Akta') dan dengan itu, tidak sah. Oleh demikian, plaintif menghujahkan transaksi jualan saham tidak sah dan terbatal dan dengan itu memohon restitusi saham berjumlah 500,000 kepadanya. Defendan pertama dan kedua menafikan dakwaan plaintif dan menghujahkan plaintif menjual saham sebanyak 500,000 dalam syarikat kepada defendan kedua bagi balasan RM8 juta dan bahawa guaman ini adalah percubaan untuk memaksa defendan-defendan membayar lebih untuk saham tersebut. Defendan kedua juga menuntut balas pemulangan RM8 juta yang diterima oleh plaintif dalam keadaan transaksi jualan saham didapati tidak sah dan terbatal.

Diputuskan, menolak tuntutan plaintif dengan kos dan tuntutan balas tanpa perintah terhadap kos:

(1) Walaupun plaintif mendakwa dia tidak boleh membaca atau menulis apatah lagi memahami Bahasa Inggeris, jelas dia bukan seorang yang tidak peka. Jelas juga daripada cara dia menangani tawaran defendan pertama iaitu menjalankan pemeriksaan bebas pada stok dan operasi dan bukan memberi jawapan pada cadangan defendan pertama bahawa dia memahami urusan perniagaan dan juga apa yang berlaku dalam syarikat. Dalam apa jua keadaan, pli *non est factum* plaintif tidak memberi kesan pada kesahan dokumen yang ditandatanganinya, khususnya dokumen jualan saham (lihat perenggan 29).

(2) Dokumen-dokumen semasa pindah milik saham juga jelas terpakai pada plaintif. Berdasarkan notis tuntutan yang dikeluarkan oleh plaintif, fakta bahawa plaintif memohon pelepasan sebagai penjamin bagi beberapa pinjaman yang diambil oleh syarikat seolah-olah mencadangkan isu

plaintif memohon penilaian semula satu fikiran semula. Dalam hal keadaan ini, plaintif tidak berjaya membuktikan tuntutannya atas imbangan kebarangkalian (lihat perenggan 27 & 29).

(3) Fakta bahawa defendan pertama mendapat bantuan kewangan daripada syarikat bagi tujuan mendapat saham syarikat jelas bertentangan dengan s 67(1) Akta. Walau bagaimanapun, transaksi jualan saham dalam kes ini sah dan berkuat kuasa walaupun terdapat percanggahan dengan s 67 Akta oleh kedua-dua plaintif dan defendan. Ini kerana transaksi jualan saham berasingan dan berbeza daripada transaksi pinjaman RM8 juta kepada defendan pertama. Transaksi pinjaman, yang dilarang oleh s 67(1) Akta dan bukan pemerolehan saham dalam syarikat. Fakta bahawa plaintif dan defendan pertama cuma pemegang saham dalam syarikat dan bahawa transaksi jualan saham dimasuki bagi masa hadapan syarikat adalah faktor-faktor yang diambil kira dalam membuat kesimpulan ini (lihat perenggan 49–52).

(4) Bagi pinjaman RM8 juta defendan pertama, terpulang pada syarikat untuk membuat keputusan. Dalam apa jua keadaan, plaintif yang bukan lagi pengarah atau pemegang saham syarikat dan tidak mempunyai locus standi untuk memulakan apa-apa tindakan terhadapnya. Selanjutnya, plaintif telah menyatakan bahawa memandangkan syarikat telah mengisytiharkan dividen RM8 juta, tiada kerugian pada syarikat yang berbangkit daripada transaksi (lihat perenggan 53).

(5) Dalam hal keadaan transaksi jualan saham sah dan berkuat kuasa, kausa tindakan plaintif dalam memohon kepada mahkamah untuk mengisytiharkan transaksi jualan saham terbatal adalah seperti meminta mahkamah ini menguatkuasakan transaksi yang berasaskan tindakan tidak sah kerana saham 500,000 yang dibeli daripada plaintif dibayar oleh wang yang diperolehi daripada transaksi pinjaman yang tidak sah. Menjadi undang-undang matan bahawa kausa tindakan yang berasaskan tindakan tidak sah tidak boleh berjaya (lihat perenggan 54–56).]

Notes

For cases on liability, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 354–356.
For cases on sale and purchase of shares in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 6838–6876.
For cases on standard of proof in general, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3031–3045.

Cases referred to

Belmont Finance Corporation v Williams Furniture Ltd and other (No 2) [1980] 1 All ER 393, CA (refd)
Carney v Herbert and Ors [1985] 1 All ER 438, PC (refd)

Charterhouse Investment Trust Ltd and others v Tempest Diesels Ltd [1986] BCLC 1, Ch D (refd)
Chettiar v Chettiar [1962] 1 All ER 494, PC (refd)
Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356, SC (refd)
Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd [1995] 3 MLJ 313, FC (folld)
Daniel s/o D William v Luhat Wan & Ors; Luhat Wan v Social and Welfare Services Lotteries Board & Ors [1990] 2 MLJ 48, HC (refd)
Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah bt Haron [2009] 8 MLJ 510, HC (refd)
Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors [1997] 4 MLJ 329, HC (folld)
Fujasa Property Sdn Bhd & Anor v Idaman Unggul Sdn Bhd & Anor [2015] 7 MLJ 892, HC (refd)
Fusing Construction Sdn Bhd v Eon Finance Bhd & Ors [2000] 3 MLJ 95, CA (refd)
Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors [1990] 1 MLJ 485; [1990] 1 MSCLC 90, SC (refd)
Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 997; [1999] 3 AMR 3161, FC (refd)
Maybank Islamic Berhad v M-10 Builders Sdn Bhd & Anor [2015] MLJU 2035; [2015] 4 CLJ 526, HC (refd)
Neo Tai Kim v Foo Stie Wah [1982] 1 MLJ 170, CA (refd)
RHB Bank Bhd v FGG Wood Mouldings Industries Sdn Bhd & Ors [2001] 4 MLJ 86, HC (refd)
Sajan Singh v Sardara Ali [1960] 1 MLJ 52, PC (refd)
Scott v Brown, Doering McNab & Co [1892] 2 QB 724, CA (folld)
Selvaduray v Chinniah [1939] MLJ 253 (refd)
Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21, FC (refd)
Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors [1999] 5 MLJ 421, HC (refd)
Tan Chor Thing v Tokyo Investment Pte Ltd & Anor [1991] 3 MLJ 87, HC (refd)
Tinsley v Milligan [1993] 3 All ER 65, HL (refd)
Tokyo Investment Pte Ltd & Anor v Tan Chor Thing [1993] 3 SLR 170, CA (refd)

Legislation referred to

Companies Act 1965 ss 67, 67(1), (2), (2)(a), (2)(b), (2)(c), (3), (6)
Contracts Act 1950 ss 24, 66
Evidence Act 1950 ss 91, 92, 101

Anthony Louis Taye (Yau Her Lerk and Mae Taye with him) (Taye & Co) for the plaintiff.

Khairil Aznan Azizi (Shamini Devi a/p Doraisamy with him) (Andrew TS Goh & Khairil) for the defendants.

Mohd Firuz JC:

[1] This is the decision of the court in respect of the plaintiff's claim and the defendant's counterclaim at the end of a full trial involving a total of ten witnesses (five for the plaintiff and five for the defendants).

BRIEF FACTS

[2] The plaintiff and the first defendant are brothers. Prior to the sale of the plaintiff's shares sometime in March 2012, both were shareholders in the third defendant ('the company') wherein each of them owned and held 500,000 shares each.

[3] The plaintiff was the chairman and director of the company whilst the first defendant was the managing director. His wife and two daughters were also employees of the company. The second defendant is the wife of the first defendant.

[4] Based on the evidence adduced at the trial, it was apparent that the first defendant had since 1994 devised some succession plan in so far as the management and operation of the company is concerned. The succession plan involved one party exiting the company and the other party assuming full control of the company by way of sale and/transfer of shares of the other shareholder (see exh P16). Similarly, based on the unchallenged evidence of SD3, the plaintiff also wanted to exit the company if the terms were favorable to him.

[5] However, no succession plan ever took place until the company successfully sold off three of its properties to San Miguel Yamamura Wovern Products Sdn Bhd and the defendant received a net sum of approximately RM6m from the same.

[6] Thereafter, the plaintiff proposed to the first defendant that the company use the proceeds of the sale to declare dividends. The first defendant on the other hand, counter proposed for the proceeds of the sale to be used towards the succession plan.

[7] Subsequently, the first defendant prepared a rough estimation as to the assets and liabilities of the third defendant (see exh P14). Having valued the

company at RM15m, the first defendant sought assistance from his sister, DW3 and her husband, DW4 to act as intermediaries to convey his proposal to the plaintiff.

[8] In essence, the first defendant's proposal was for either the plaintiff or himself to exit the company. As consideration, the party exiting the company will be paid a sum of RM7.5m for their 500,000 shares.

[9] Sometime in early March 2012, both DW3 and DW4 went to the plaintiff's house and conveyed the proposal of the first defendant to the plaintiff in the presence of the plaintiff's wife, PW5. At that point in time, the plaintiff did not communicate as to whether he was accepting or rejecting the proposal.

[10] Subsequently, the plaintiff met DW3 and informed her that he wanted to exit the company but at RM7.5m, he was half-hearted. Yet, the plaintiff still did not indicate as to whether he was accepting or rejecting the proposal.

[11] A few days later, the plaintiff called DW3 requesting for DW4 to accompany him to check stocks and machineries (reason being, DW4 runs a similar business with that of the company). DW4 acceded to the plaintiff's request. The inspection then proceeded at the company's premise in the presence of the plaintiff, PW3 and DW4.

[12] Despite the inspection of the stocks and machineries, the plaintiff still did not revert on the proposal. This prompted DW3 to contact the plaintiff. She telephoned him and asked whether he would agree to accept a further sum of RM500,000 making the offer to exit the company at RM8m, DW3 confirmed that the plaintiff agreed to sell his shares at RM8m.

[13] Thereafter, DW3 contacted the first defendant informing that the plaintiff had agreed to sell his shares in the company for RM8m. The first defendant agreed to the price of RM8m.

[14] On 19 March 2012, both the plaintiff and the first defendant signed a resolution allowing the first defendant to borrow RM8m from the company. This resolution was prepared by the company secretary upon instructions of the first defendant.

[15] On 23 December 2012, both the plaintiff and the first defendant signed a resolution at the company secretary's office appointing the second defendant and PW3 as directors of the company.

[16] Subsequently, the company issued two cheques amounting to RM8m (RM2m and RM6m respectively) dated 26 March 2012 and 28 March 2012 to the first defendant.

[17] On 29 March 2012, the plaintiff tendered his resignation (exh D19) which was witnessed by PW3. This was at the company secretary's office. During the same occasion, the plaintiff also signed the following documents:

Confirmation of consideration for shares transfer (exh D20):

(a) Form 32A of the Companies Regulations 1966 being the share transfer form (exh D21);

(b) director's resolution accepting the plaintiff's resignation as a director of the company (exh D46); and

(c) a director's resolution to confirm the transfer of shares from the plaintiff to the second defendant (exh D33).

[18] In so far as payment of the RM8m to the plaintiff concerned, he received payment as follows:

Cheque for RM1m dated 29 March 2012:

(a) a cheque for RM1m dated 29 March 2012; and

(b) six cheques for RM1m (each dated 31 March 2012).

[19] It is important to note that the first defendant had at all material times admitted that he had advanced RM8m loan which he borrowed from the company to the second defendant, to enable her to purchase the plaintiff's shares.

[20] In April–May 2012, the company declared a dividend amounting to RM8.5m. The dividends were apportioned equally between the first and second defendants and subsequently used to set off the loan of RM8m taken by the first defendant from the company.

[21] The plaintiff's solicitors issued two notices of demand dated 10 April 2014 wherein the plaintiff demanded for the return of his 500,000 shares and his reinstatement as a director of the company within 14 days from the date of receipt of the notice. The first and second defendant replied to the said notice via their solicitors letter dated 25 April 2014. The plaintiff's solicitors then replied by way of a letter dated 6 May 2014. It was only in this reply that the plaintiff claimed that the RM8m that was paid to him was only an initial payment and that the final figure for the 500,000 shares is subject to audited accounts of the company's assets and liabilities as of 31 March 2012.

ISSUES FOR TRIAL

[22] Whilst the issues for trial are contained in Bundle F, during the course of the hearing before me, it was agreed that the trial should proceed to determine the following issues without going into the quantum of the claim:

(a) whether the shares sale transaction between the plaintiff and the first and second defendants is valid and enforceable in law? and

(b) if the transaction is valid, is the plaintiff entitled to claim from the first and second defendants the balance of the actual market value for the plaintiff's 500,000 shares purchased by the first and second defendants as at 31 March 2012 less the RM8m initial payment received by the plaintiff?

[23] Counsel for both the plaintiff and the defendants agreed that in the event this court finds that the transaction is invalid, null and void, there is no necessity for me to decide on the second issue. However, if the transaction is found to be valid, I will have to decide as to whether the plaintiff had successfully proven that sale of the plaintiff's 500,000 shares were on actual market value of the shares as at 31 March 2012.

[24] Notwithstanding the agreement by both parties as stated in para 22 above, I propose to deal with the second issue first.

Whether the plaintiff had successfully proven that the sale of the plaintiff's 500,000 shares was on actual market value of the shares as at 31 March 2012 and that the payment of RM8m was only as an initial payment?

[25] The plaintiff's submission on this issue is as follows:

(a) the testimony of the plaintiff ('PW4') clearly shows that he did not agree to the offer of RM8m for his 500,000 shares in the company;

(b) this issue cannot be concluded merely based on the resolutions and documents as the plaintiff cannot understand the English language, what more read and understand them. The company secretary ('DW2') did not explain the contents of these documents to him;

(c) there is no basis for any reasonable person including the plaintiff to agree to only an estimate of the value of the company's assets as the basis to value the plaintiff's shares;

(d) it was not the plaintiff who wanted to cash out his shares and exit from the company but it was the first defendant's idea all this while for him to do so;

(e) exh P14 is an unsubstantiated estimate of the third defendant's assets written on a piece of paper and purely an assumption of what the company is worth;

(f) the plaintiff did in fact take steps to value the real worth of the company by inspecting the machineries and stock. The plaintiff also requested for the details of the company's bank accounts even in November 2013;

(g) that the first defendant had motive and devised a scheme to defraud the plaintiff;

(h) ss 91 and 92 of the Evidence Act 1950 is not applicable for purposes of rebutting the plaintiff's oral evidence regarding exhs D20 and D21;

(i) that this issue is not an afterthought as it was raised in the plaintiff's notice of demand ('NOD') after the defendant's reply dated 25 April 2014 to the plaintiff's first NOD, wherein the defendant rejected the plaintiff's contention that the sale and purchase and transfer of his 500,000 shares in the company which was paid by the loan given by the company was contrary to the provisions of the Companies Act 1965 ('the Companies Act'); and

(j) the second NOD is also not an afterthought because the notice was merely to notify the defendants of the impending suit. As such whether its contents are accurate or otherwise is irrelevant as the accuracy of the plaintiff's claim becomes only material when the writ and statement of claim is filed by him.

[26] In response, the defendant submitted that:

(a) the plaintiff's purported illiteracy in the English language seems to have been self rebutted during cross examination wherein he was able to read and identify the sale and purchase agreement of the three properties belonging to the company to San Miguel ('exh D34'). Even if the plaintiff did not understand English, it does not affect the validity of those documents signed or make it less effective than the ones he understood;

(b) the plaintiff's conduct in requesting that he be discharged as guarantor from certain debts owed by the company to creditors shows that he had actual knowledge of the affairs of the company and was not kept in the dark by the first defendant;

(c) the testimonies of PW3, the first defendant, DW2 and DW3 confirmed that the plaintiff attended to the signing of the requisite documents on three different occasions at the company secretary's office. On two of the occasions, the plaintiff proceeded to have lunch with PW3 and the rest of the family members after having signed the documents;

(d) the payment in the sum of RM8m via two cheques was released to the plaintiff;

(e) exh D20, the confirmation of consideration for shares transfer, clearly showed that the consideration for the plaintiff's 500,000 shares in the company was RM8m and nothing more;

(f) exh D21, the share transfer form also stated that the consideration for the plaintiff's 500,000 shares in the company was RM8m. Adjudication on the share transfer was done and the stamp duty on the sale of RM8m was duly paid ('exh D40');

(g) the testimony of DW3 and DW4 who are disinterested parties to the case also supports the defendant. DW3 confirmed that that deal for the plaintiff's 500,000 shares in the company was for RM8m;

(h) if the RM8m was a mere deposit, there was no necessity for the first defendant to increase his initial offer of RM7.5m to RM8m;

(i) the plaintiff's own testimony showed that he only told the first defendant about the revaluation in 2013 (despite initially saying that he told the first defendant about it in 2014). This conforms with DW3's testimony as her answer to question 20 of WSD3;

(j) whilst the plaintiff submitted that the second defendant was merely holding the 500,000 shares as the first defendant's nominee, this was not pleaded by the plaintiff. In any event, the second defendant denies that she was holding the shares on behalf of the first defendant. Relying on the decision in *Neo Tai Kim v Foo Stie Wah* [1982] 1 MLJ 170 which was referred to and adopted in *Dato' Kadar Shah bin Tun Sulaiman v Datin Fauziah bt Haron* [2009] 8 MLJ 510, the defendant was of the view that the doctrine of presumption of advancement applies;

(k) the plaintiff's testimony that the first defendant had undertaken to furnish the company's audited account as at 31 March 2012 to enable the assets and liabilities of the company to be assessed for purposes of arriving at a final price is unsubstantiated;

(l) the plaintiff through his solicitors sent notices of demand, both dated 10 April 2014 (as at pp 23–26 of Bundle B), wherein he demanded from the first and second defendant the immediate return of his 500,000 shares and that he be reinstated as director of the company within 14 days from the date of the notice. The solicitors for the first and second defendant replied via their letter dated 25 April 2014 (as at pp 27–28 of Bundle B) denying that the sale of shares transaction was void due to illegality. It was only in the plaintiff's solicitors reply dated 6 May 2014 did the plaintiff claim that the RM8m paid received by the plaintiff was initial payment and that the final figure would depend on the audited accounts as at 31 March 2014; and

(m) the evidence adduced by the defendants including that of the plaintiff on the issue of revaluation of the shares leads to an irresistible conclusion that the plaintiff sold his 500,000 shares in the company to the second defendant for a consideration of RM8m only, nothing more and nothing less. The plaintiff's claim was an attempt to force the second defendant to pay more for the shares.

[27] At this juncture, the question before me is whether the plaintiff has succeeded in proving their claim as required under s 101 of the Evidence Act 1950. The said provision states as follows:

> (1) Whoever desire any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> *Illustrations*
>
> (a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.
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> A must prove that B has committed that crime.
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> (b) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.
>
> A must prove the existence of those facts.

[28] The burden for the plaintiff to prove his case does not shift on to the defendants (see *Selvaduray v Chinniah* [1939] MLJ 253).

[29] I am of the considered view that the plaintiff did not succeed in proving his case on a balance of probabilities. My reasons for finding so are as follows:

(a) having heard the testimony of the plaintiff and observed his demeanor, I find that the plaintiff is not an ignorant a person as described in the plaintiff's submission. To my mind, he is a person who understands the order of business as well as what was going on in the company. This finding is not surprising as there was ample evidence to show that the plaintiff was running the business before the first defendant took charge of the family business;

(b) this is also evident from the manner as to how the plaintiff dealt with the offer from the first defendant wherein instead of giving any answer to the first defendant's proposal, the plaintiff conducted an independent inspection on the stocks and machineries;

(c) despite the plaintiff's submission that the plaintiff cannot read or write what more understand English, I clearly observed as to how well

acquainted the plaintiff was with exh D34, namely the sale and purchase agreement between the company and San Miguel Yamamura Woven Product. In any event, I agree with the defendant's submission that the plaintiff's *plea of non est factum* does not affect the validity of the documents that he signed (see *RHB Bhd FGG Wood Moulding Industries Sdn Bhd & Ors* [2001] 4 MLJ 86);

(d) despite the plaintiff's submission that the plaintiff did request for a revaluation of the company's assets, it was in fact on two occasions when the plaintiff gave evidence that he made the request in 2014, when only later he corrected himself. During cross-examination, the plaintiff said, 'Saya buat keputusan untuk taksir semula pada tahun 2014. Bukan ... tahun 2012'. I had noted this fact in my notes. During re-examination, the plaintiff again said that he told the first defendant that he wanted to re-assess the shares in 2014. To my mind, if the revaluation was indeed requested by the plaintiff in 2012, the year 2012 would automatically be ingrained in his mind instead of the year 2014;

(e) despite the testimony of SD3, sister to both the plaintiff and the first defendant, saying that the plaintiff only approached her in 2013 to request for a revaluation, the plaintiff's counsel failed to challenge her testimony. Such a failure is detrimental to the plaintiff's case and works against the plaintiff's stand; and

(f) last but not least, the contemporaneous documents on the transfer of the shares, clearly operated against the plaintiff. Looking at the notices of demand itself the replies and response by the plaintiff's solicitors, with the first notice on seeking a discharge of the plaintiff as guarantor for some of the loans taken by the company as well as on the contravention of s 67 of the Companies Act, I find it difficult not to conclude that the issue of the plaintiff seeking for a revaluation is an afterthought.

[30] Having said the above, I shall proceed to deal with the first issue.

Whether the shares sale transaction is valid and enforceable in law?

[31] In summary, the plaintiff's submissions on this issue are as follows:

(a) for purposes of acquiring the plaintiff's shares, the first defendant took a loan of RM8m from the company. This fact was not disputed by the first defendant;

(b) the fact that the first defendant obtained financial assistance from the company for purposes of acquiring shares in the company, clearly contravened s 67(1) of the Companies Act:

> Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan, guarantee or

the provision of security or otherwise, any financial assistance for the purpose of or in connection with the purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.

(c) whilst it was never stated in the company's books that the loan taken by the first defendant from the company was for the purpose of acquiring the plaintiff's shares, it still amounts to financial assistance and is thus caught by s 67(1);

(d) due to the financial assistance obtained by the first defendant, the entire shares sale transaction is illegal, null and void and unenforceable;

(e) the loan also contravenes article 5 of the company's articles of association (see exh D41);

(f) once the issue of illegality has been established, the principle that the court ought not to enforce an illegal contract, would be applicable (see *Maybank Islamic Berhad v M-10 Builders Sdn Bhd & Anor* [2015] MLJU 2035; [2015] 4 CLJ 526);

(g) the defendants cannot rely on s 67(6) of the Companies Act to validate the transaction as it is a recourse to the company only in the event the company decides to recover the loan of RM8m taken by the first defendant. Moreover, the company has not suffered any loss as the RM8m loan has already been paid in full by the contra of the dividends declared, a fact which is also not in dispute;

(h) the counterclaim by the second defendant for the return of the RM8m received by the plaintiff, in the event the court finds the share sale transaction null and void is without basis as she has no knowledge whatsoever regarding the transaction as well as the repayment of the RM8m loan by way of the contra dividends as the scheme was contrived by the first defendant alone. In addition the loan was taken by the first defendant and not by the second defendant. If so, the proper claimant for the RM8m should be the company, who chose not to do so;

(i) even if the company chose to recover the RM8m loan, it can only do so after the shares have been returned and parties revert to the original status quo prior to the share sale transaction;

(j) on account of the financial assistance obtained by the first defendant, the share sale transaction is illegal, null and void and unenforceable. Thus, the plaintiff's 500,000 shares should be returned to him;

(k) the return of the 500,000 shares to the plaintiff would not tantamount to unjust enrichment as the company has been repaid by way of the contra dividends declared; and

(l) s 66 of the Contracts Act 1950 ('the Contracts Act') which provides:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or the contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

is also not available to the first and second defendants because the illegality of the scheme was not discovered to be void, but was schemed from day one via the sale of the company's properties to San Miguel Yamamura Wovern Products Sdn Bhd.

[32] Given opportunity to put in further submissions, the plaintiff submitted as follows:

(a) that there are exceptions to the general rule that property transferred under an illegal contract cannot be recovered as held in the case of *Tan Chor Thing v Tokyo Investment Pte Ltd & Anor* [1991] 3 MLJ 87 which was affirmed by the Singapore Court of Appeal in *Tokyo Investment Pte Ltd & Anor v Tan Chor Thing* [1993] 3 SLR 170:

(i) if the plaintiff can establish that the illegal aspect of the contract was not disclosed to him;

(ii) the plaintiff was not *in pari delicto*; and

(iii) if there is a statutory provision allowing so;

(b) as the RM8m loan taken by the first defendant from the company was illegal, it means that the plaintiff did not receive any consideration for his 500,000 shares;

(c) in view of the fact that the defendants have admitted that the shares sale transaction is illegal, the shares must be restituted back to the plaintiff pursuant to s 66 of the Contracts Act. The party may only seek restitution under the provision if they were unaware of the illegality;

(d) there is no evidence to suggest that the plaintiff was aware of the contract was illegal nor that he was *in pari delicto*;

(e) the plaintiff only discovered upon the illegality after consulting his lawyers who raised the matter in the first NOD; and

(f) that being the case and to avoid any allegation of unjust enrichment on the part of the plaintiff upon restitution of his 500,000 shares to him, the plaintiff prays that he be required to pay only the sum of RM3.75m (ie RM8m minus RM4.25m) to the company or the first defendant as that sum can be regarded as part of the dividends declared to him by the company.

[33] On the opposing hand, the defendants submitted as follows:

(a) the shares sale transaction is valid as it does not in any way contravene s 24 of the Contracts Act as reproduced below:

> 24 What considerations and objects are lawful and what are not
>
> The consideration or object of an agreement is lawful unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

(b) the defendants concede that the giving of the loan by the company to the first defendant did tantamount to granting of financial assistance as envisaged in s 67(1) of the Companies Act;

(c) the granting of the RM8m loan to the first defendant was approved by both the plaintiff and the first defendant with the knowledge that the loan will be used to pay off the plaintiff for his shares;

(d) relying on the following decisions, the defendant submitted that whilst the granting of the loan to the first defendant was in contravention of s 67(1) of the Companies Act, s 24 of the Contracts Act is not applicable due to its exclusion by the saving clause in s 67(6) of the Companies Act which allows for recovery under an illegal contract. See:

(i) *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* [1997] 4 MLJ 329; and

(ii) *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997;

(e) relying on the case of *Fujasa Property Sdn Bhd & Anor v Idaman Unggul Sdn Bhd & Anor* [2015] 7 MLJ 892, where the Court of Appeal made a finding that although there was indeed a breach of s 67, nevertheless the settlement and assignment agreement was saved by the provisions of s 67(6) which excluded the application of s 24 of the Contracts Act. Despite the settlement and assignment agreement contravening s 67(1)of the Companies Act, there was no civil consequences and the settlement and the assignment agreement was not rendered null and void;

(f) what is prohibited under s 67(1) of the Companies Act was the giving of financial assistance and not the acquisition of the shares itself;

(g) alternatively, if the transaction is tainted by illegality for breach of s 67(1) of the Companies Act, the maxim *'ex turpi causa non oritur actio'* applies whereby no action can arise from a dishonorable cause;

(h) there was evidence to suggest that the plaintiff was indeed aware as to the purpose of the RM8m loan utilised;

(i) that being the case, the court should not aid the plaintiff who is seeking to annul the transaction. The plaintiff's action should be dismissed on account of illegality where the loss lies where it falls;

(j) in the event the court orders for the 500,000 shares to be returned to the plaintiff, the court should also order the plaintiff to refund the RM8m he received as consideration for the shares. This is in line with s 66 of the Contracts Act; and

(k) the suggestion by the plaintiff that he only needs to refund RM3.75m out of the RM8m he received for the shares tantamounts to allowing the plaintiff to be unjustly enriched by retaining RM4.25m which is part of the total consideration of RM8m to purchase the shares.

[34] In response to the plaintiff's further submission, the defendant replied as follows:

(a) even the court was of the view that there was a breach of s 67(1) of the Companies Act, the share sale transaction was still valid as based on the cases of *Datuk Tan Teck Leng*, *Lori Malaysia* and *Fujasa*, there are no civil consequences to the particular breach complained of. The defendant also relied on the Privy Council's decision in *Carney v Herbert and Ors* [1985] 1 All ER 438;

(b) the first defendant was equally ignorant as the plaintiff in this case that s 67(1) of the Companies Act prohibited the granting of financial assistance for the purchase of the company shares;

(c) the court ought to be mindful that the issue before the court in the present case is not for recovery of property where the contract is illegal or void. The plaintiff is moving this court to declare the share sale transaction void due to illegality. That being the case, can the court aid a party to an illegal contract to annul it?

(d) the case of *Tan Chor Thing v Tokyo Investment Pte Ltd & Anor* relied upon by the plaintiff is not applicable to the facts before this court as the facts and circumstances there were different. There, the shares were pledged by an innocent third party who had no connection with the illegal transaction;

(e) the plaintiff's submission that they have not received any consideration for the 500,000 shares is misleading. The evidence clearly showed that the plaintiff received RM8m for the shares;

(f) the share sale transaction is totally separable and distinct from the loan granted by the company to the first defendant. Even if the court finds that it is tainted due to the illegality of the loan transaction, which the defendant denies, on the authority of the Privy Council decision in *Sajan Singh v Sardara Ali* [1960] 1 MLJ 52. Good title had indeed passed to the second defendant. The defendant also relies on the decision in *Daniel s/o D William v Luhat Wan & Ors; Luhat Wan v Social and Welfare Services Lotteries Board & Ors* [1990] 2 MLJ 48;

(g) here, the shares were already registered in the second defendant's name. She was never a party to the financial assistance that contravened s 67(1). See *Tinsley v Milligan* [1993] 3 All ER 65 and *Fusing Construction Sdn Bhd v Eon Finance Bhd & Ors* [2000] 3 MLJ 95;

(h) the plaintiff's submission that he cannot be held complicit to the commission of the illegal act as he could not remember and was not sure of its contents is caught by the maxim *ignorantia juris non excusat* or *ignorantia legis neminem excusat*;

(i) s 66 of the Contracts Act relied upon by the plaintiff only applies to contracting parties and not third parties or strangers. Here the share sale transaction was between the plaintiff and the second defendant. Hence, it has no applicability in so far as the first defendant is concerned; and

(j) in the event this court makes an order that the share sale transaction is void and orders for the 500,000 shares to be returned to the plaintiff, the court should also order the RM8m received by the plaintiff to be returned.

THE LAW

[35] Section 67(1) of the Companies Act provides as follows:

> Except as is otherwise expressly provided by this Act no *company shall give, whether directly or indirectly and whether by means of a loan*, guarantee or the provision of security or otherwise, *any financial assistance for the purpose of or in connection with the purchase* or subscription made or to be made *by any person* of or *for any shares in the company* or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares. (Emphasis added.)

[36] The prohibition laid down in s 67 above, involves two ingredients. Firstly, there must be financial assistance given by the company. The financial assistance may be given 'directly or indirectly' and includes a loan, guarantee, pledged for security. Secondly, the financial assistance given is 'for the purpose

of or in connection with' the purchase of the company's shares.

[37] For purposes of determining whether or not there was any financial assistance given in contravention of s 67, the courts have more often than not, looked at the commercial aspects of each transaction separately instead of taking a narrow stand on the subject matter concerned. See: *Charterhouse Investment Trust Ltd and others v Tempest Diesels Ltd* [1986] BCLC 1.

[38] The following have been held amounting to giving financial assistance in contravention to the prohibition in s 67:

(a) using a loan from a bank secured by the hotel's land to purchase shares in the company that owns the hotel: *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356;

(b) a transfer of shares in a company which owned development land to a developer in return which the developer would build houses on the land and transfer some of the houses constructed to the shareholders: *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors* [1990] 1 MLJ 485; [1990] 1 MSCLC 90;

(c) the depletion of company assets by way of transfer of shares involving the transfer of a lease and a lease back agreement: *Simmah Timber Industries Sdn Bhd v David Low See Keat & Ors* [1999] 5 MLJ 421; and

(d) where a company purchased property from a person at an inflated price with the sole purpose of enabling that person to purchase the company's shares: *Belmont Finance Corporation v Williams Furniture Ltd and other (No 2)* [1980] 1 All ER 393 (CA), Buckley LJ, speaking for the Court of Appeal said at p 403:

> It was an exceptional and artificial transaction and not in any sense an ordinary commercial transaction entered for its own sake in the commercial interests of Belmont. It was part of a comparatively complex scheme for enabling Mr. Grosscurth and his associates to acquire Belmont at no cash cost to themselves, the purchase being found not from their own funds or by the realization of any assets of theirs (for Maximum continued to be part of their group of companies) but out of Belmont's own resources.

[39] The underlying principle governing this prohibition is that those who purchase shares in a company should do so from their own resource and should not in any way make use of the company's resources. To do so may cause assets of the company to dissipate to the detriment of the company's financial position and prejudicial to the interests of the shareholders.

[40] Notwithstanding the wide scope of the prohibition, there are three statutory exceptions namely:

(a) s 67(2)(a): to the shares of a company whose ordinary business is money lending;

(b) s 67(2)(b): whereby financial assistance is provided by a company for shares to be held by trustees for the benefit of employees; and

(c) s 67(2)(c): where financial assistance is given by a company to its employees to purchase its fully-paid shares.

EFFECT OF BREACH OF FINANCIAL ASSISTANCE PROHIBITION

[41] A breach of the prohibition invites both criminal and civil consequences.

[42] Under s 67(3) each officer who is in default is liable to a fine of up to RM100,000 or five years imprisonment or both.

[43] In so far as civil consequence is concerned it is regulated by sub-s (6) of s 67. Subsection (6) was amended by the Companies (Amendment) (No 2) Act 1992 which came into effect on 10 September 1992. Under the original version, 'the company' was not prevented from recovering the amount of any loan made in breach of s 67.

[44] Subsection (6) of s 67 was amended by the inserting the words 'or any person' after the words 'the company'. The amended sub-s (6) reads as follows:

> Nothing in this section shall operate to prevent the company [or any person] from recovering the amount of any loan made in connection of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section.

[45] In *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*, the Supreme Court held that a transaction made in breach of the financial assistance prohibition would be null and void under s 24 of the Contracts Act. It was further held that the words 'the company' referred to the company itself which had provided the financial assistance and the meaning of the words did not included a third party — the lender in that case. The Supreme Court in *Kidurong Land Sdn Bhd & Anor v Lim Gaik Hua & Ors*, also held that an agreement which contravenes s 67 is void and unenforceable under s 24 of the Contracts Act.

[46] In *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 3 AMR 3161, the Federal Court departed from the Supreme Court's approach in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*.

[47] The brief facts in *Lori* are as follows:

Lori (M) Bhd ('Lori') had charged land belonging to it by way of security in favour of Arab Malaysia Finance Berhad ('AMFB') for a loan. Lori was originally owned by Majlis Amanah Rakyat ('MARA'). MARA had appointed Technivest Sdn Bhd to manage Lori. Later MARA offered to sell its shares in Lori to Technivest. AMFB required a charge of the land owned by Lori as security for the loan facility. The charge and loan facility agreement were executed on 11 October 1990. Lori defaulted in the repayment of the loan and AMFB applied to the High Court to enforce the charge by way of an order for sale. At the High Court, Lori contended that the charge was unenforceable as it contravened s 67 of the Companies Act. Lori's contention was rejected and the order for sale was granted in favour of AMFB. Lori appealed to the Federal Court on the ground that the High Court erred in holding that the loan facility arrangements did not contravene the prohibition under s 67 of the Companies Act. The Federal Court dismissed the appeal.

[48] In dismissing the appeal, the Federal Court in *Lori*, took the view that *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor*, was decided per incuriam because the Supreme Court failed to actually construe the words 'for which it become liable' in sub-s (6). There was too much emphasis given on the provisions of s 24 of the Contracts Act and held that because the bank had knowledge of the illegality and the nature of the transaction at the material time, the bank's claim failed. The Federal Court took the view that sub-s (6) creates an important exception to s 24 of the Contracts Act by allowing recovery under illegal contract, thereby excluding the operation of s 24. Subsection (6) was enacted for the protection of the company's funds and the interests of shareholders as well as creditors and the general public. It went on to hold that the Supreme Court in *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* had been unduly swayed by certain English cases as the relevant legislation in which they were decided did not have an equivalent sub-s (6) saving provision.

THE COURT'S ANALYSIS

[49] Based on my reading of the authorities furnished and the facts before me, I am of the view that the share sale transaction before me is valid and enforceable despite there being a contravention of s 67 of the Companies Act by both the plaintiff and the first defendant.

[50] To my mind, the share sale transaction is separate and distinct from the loan transaction of RM8m to the first defendant. It is the loan transaction which is prohibited by virtue of s 67(1) of the Companies Act and not the acquisition of the shares in the company.

[51] In holding so, I am adopting the approach of the Federal Court in the case of *Co-operative Central Bank Ltd (In receivership) v Feyen Development Sdn Bhd* [1995] 3 MLJ 313 and the judgment of Augustine Paul J (as he then was) in *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* which was dully approved by the Federal Court in *Lori* as well as the decision in *Fujasa*.

[52] The fact that there the plaintiff and the first defendant are the only shareholders in the company and that the share sale transaction was entered into for the future of the company is similar to that in the case of *Datuk Tan Leng Teck v Sarjana Sdn Bhd & Ors* and re-produced below is the relevant part of the judgment in extenso:

At p 351 para F:

> Be that as it may, the fact that the first defendant provided financial assistance to the second defendant to acquire the shares will not amount to financial assistance within the meaning of s 67(1) of the Act if the transaction was a bona fide commercial transaction entered into in good faith. The available evidence shows that the allotment of the 1m shares was in line with the first defendant's programme for expansion. However, that does not mean that the allotment of the shares to the second defendant at no cost is a bona fide commercial transaction. As a matter of fact, the subscription of shares in the first defendant by the second defendant was not a commercial transaction as far as the first was concerned. It was not a transaction whereby the first defendant acquired anything which it genuinely needed for its own purpose. On the other hand, it was a transaction which facilitated the second defendant's acquisition of control of the first defendant for its own purpose. It was certainly not a transaction in the ordinary course of the first defendant's business. As Buckley LJ said in *Belmont Finance Corp v Williams Furniture Ltd & Ors (No 2)* [1980] 1 All ER 393 in somewhat similar circumstances, at p 403 ...
>
> ... I therefore hold that the first defendant has provided financial assistance to the second defendant for the subscription of the 1m shares within the meaning of s 67(1) of the Act. The ensuing matter for deliberation is the legal effect of an agreement made in contravention of s 67(1) ...

At p 355 para F (to start from p 354 para E):

> There is much to be said for the view that once a statutory penalty has been provided for an offence, the rule of the common law in determining the legal consequences of commission of the offence is thereby diminished (see my judgment in *Jackson v Harrison* (1978) 138 CLR 438 at p 452 ...

At p 358 para D:

> The transparent ratio to be discerned from the cases that I have anatomised is that a contract which is prohibited by statute does not become void and unenforceable if the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself. Section 24 of the Contracts Act cannot apply to such a contract for the obvious reason that the statute itself has saved the contract which was otherwise forbidden. As Gibbs ACJ observed

in the passage from the Yango decision, which I have reproduced in an earlier part of the judgment, it is only in a rare situation in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable. Section 67 of the Act is one of the instances of such rare exercise of legislative power. *I therefore hold that as* s 67(3) *prescribes penalties for a breach of* s 67(1) and s 67(6) *provides remedies for the breach and, furthermore, having regard to the context and purpose of* s 67(1)*, any transaction entered into in breach of the section is valid and enforceable. In the circumstances the agreement in this case does not become void and unenforceable.* The corollary I that the transaction entered into by the parties is valid and, in consequence thereof, the first defendant may enforce payment arising from the allotment of the shares for which it gave financial assistance ...

Notwithstanding what I have said thus far, I must point out that the declarations sought by the plaintiff are to render only the allotment of shares to the second defendant void. My immediate response is that s 67(1) only prohibits the giving of financial assistance for the acquisition of shares and not the acquisition of the shares itself which is perfectly lawful unless there is evidence, of which there is none, that is was illegally allotted by, for example, not following the proper procedure. The allotment of shares to the second defendant is therefore not hit by s 67(1) and is thereby not invalidated in any way (see *Spink (Bournemouth) Ltd v Spink* [1936] 1 All ER 597 and *EH Dey Pty Ltd (In liquidation) v Dey* [1966] VR 464) without the need to invokes 67(6). This, however, is subject to an important qualification. *As the allotment of shares in this case is connected with the financial assistance provided by the first defendant, the activation of* s 67(1) *depends on whether both the transactions can be severed. If they can, then the transaction relating to the acquisition of shares does not come with* s 67(1) *(see Carney v Herbert* [1985] AC 301*). It is not necessary for me to decide whether the two transactions can be severed for two reasons: firstly, it was not argued before me; and secondly, it is not relevant for obvious reasons as the result would be the same whether the transactions are severable or not. If they are severable, the allotment of shares is valid as it is not prohibited by* s 67(1). *If they are not severable the composite transaction will be governed by* s 67(6) *and will still be valid.* (Emphasis added.)

[53] As to the loan of RM8m to the first defendant, it is up to the company as to what it decides to do as s 67(6) of the Companies Act does allow so. The plaintiff who is no longer a director or shareholder of the company has no locus standi to initiate any action on it. Furthermore, the plaintiff had duly submitted that since the company has declared a dividend of RM8m, there is no loss to the company arising from the transaction. I am of the view that this is the mischief intended to be proscribed by s 67. From the company entity's point of view, the net effect to issuing a loan for RM8m to its shareholders to be set-off subsequently by a declaration of dividends, or to immediately declare and issue dividends RM8m has little difference. In fact, rather than be entangled in a shareholders dispute leading to its ultimate demise as has oft happened, the implementation of the transaction between its only (two) shareholders has indeed allowed a smooth transition and thus continuity of the operation of the company.

[54] In the event I am wrong in holding that the share sale transaction is valid and enforceable, I am of the view that the plaintiff's cause of action in asking this court to declare the share sale transaction void, is akin to asking this court to enforce a transaction, founded on an illegal act due to the fact that the 500,000 shares purchased from the plaintiff was paid via monies obtained from an illegal loan transaction.

[55] It is trite law that a cause of action which is founded on an illegal act cannot succeed (*Chettiar v Chettiar* [1962] 1 All ER 494 at p 498).

[56] Similarly, in *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21 it was held following Lindley LJ in *Scott v Brown, Doering Mc Nab & Co* [1892] 2 QB 724:

> No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality.

[57] I therefore dismiss the plaintiff's claim with cost of RM30,000.

[58] The defendants' counterclaim is dismissed with no order as to costs.

Claim and counterclaim dismissed with costs of RM30,000 and no order as to costs, respectively.

Reported by Kohila Nesan